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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CLIFFORD ONG, Defendant and Appellant.	G040468 (Super. Ct. No. 06NF2168) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Susan Miller, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant Clifford Ong of attempting to perform a lewd act on a child under age 14 (Pen. Code, §§ 664, 288, subd. (a)). The trial court sentenced him to the middle term of three years' imprisonment. Defendant argues that there was insufficient evidence that he knew the intended victim was under age 14 or that his conduct went beyond preparation to commit the charged offense. He also contends the court abused its discretion by denying probation.

We conclude there is substantial evidence to support his conviction and the court did not abuse its discretion in sentencing him to a prison term. We therefore affirm the judgment.

FACTS

We present the facts in the light most favorable to the judgment in accord with established rules of appellate review. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

An officer of the Anaheim Police Department set up a sting operation, designed to apprehend Internet predators, by creating a chat room profile of a fictitious 13-year-old girl he named Kristi Connors. He gave her the screen name "PAPASLITTLEGIRL13." Because the chat room required participants to be at least 18 years old, he entered that age in her profile but also stated, "I'm really 13 but I say I'm 18 so I could chat and meet people." He listed her gender as "female."

The officer entered the chat room as PAPASLITTLEGIRL13 where he received a message from "JUSTBE00," asking PAPASLITTLEGIRL13's age, sex, and location. The officer responded that (s)he was a 13-year-old female from Anaheim. The two exchanged pleasantries, each agreed to be on the other's "friends list," and the conversation ended.

A few days later, the officer was again online as PAPASLITTLEGIRL13. (S)he sent a blank screen to JUSTBE00, inviting a response. JUSTBE00, now identified as Cliff Ong, responded and the two conducted an online conversation. The officer stated (s)he was home early from school and defendant inquired what school she attended. After some further discussion regarding school, the officer asked defendant how old he was and he responded "21 and you?" The officer responded "13."

After some further exchanges, defendant asked whether his correspondent had a boyfriend. The officer responded in the negative and asked defendant whether he had a girlfriend; defendant stated he was single. The officer asked defendant for a picture; he stated he did not have one but asked for a picture in turn. The officer referred defendant to a picture on Connors' profile and defendant asked for another one. Thereafter there was a conversation about sending a photo, which the officer sent by e-mail, followed by questions and answers about the correspondents' respective physical appearance and their interests in sports. This conversation then ended.

Later that afternoon when the officer got back online there was a message from JUSTBE00, which lead to another chat room conversation, wherein the following exchange took place (with some less significant omissions and some corrections for abbreviated e-mail spellings). Defendant: "Me open to anything" and "What about you?" Officer: "What about me?" Defendant: "Are you open minded?" Officer: "Yes." Defendant: "How open?" Officer: "What do [you] have in mind?" Defendant: "Anything." Officer: "OK." Defendant: "Are you [a] virgin?" Officer: "Not really, I don't think I am." Defendant: "When did you lose it?" Officer: "3 months ago." Defendant: "Wow." "That not long." Officer: "Yea, but we kinda started but we didn't really finish so I don't know if that counts." Defendant: "What [you] mean?" Officer: "We were interrupted so we didn't really get all the way into it if that makes sense." Officer: "How old were [you] when [you] lost it?" Defendant: "15." Officer: "I don't feel bad then." Defendant: "Was he your [boyfriend]?" Officer: "No." Defendant:

"How did you guys meet?" Officer: "Online." Defendant: "Where did you guys do it at?" Officer: "In his car at the park, but other cars pulled in so we stopped."

After some comments concerning this incident, defendant: "W[h]at you[]guys do?" Officer: "Messed around, and almost did it." Defendant: "You oral?" Officer: "I have to learn." Defendant: "What's to learn?" Officer: "Do [you] do it?" Defendant: "I[']m a pro." There was some further discussion concerning defendant's knowledge of this art. Defendant: "What did you do?" Officer: "What do [you] mean?" Defendant: "When you guys did it." Officer: "[Are you] like a[n] all talk kinda guy?" Defendant: "Depends on you." They then talked about "doing it" and the officer stated "I want to." After some further exchange, defendant: "Why do you want to do it when you['re] only 16?" Officer: "I'm 13 and everyone tells me it feels great." Defendant: "Like who?" Officer: "Friends at school, my sister, her friends. [Are] they wrong?" Defendant then inquired about his correspondent's sister and, after some exchanges, asked "what you looking for?" Officer: "What [are you] looking for?" Defendant: "Fun in life and you?" Officer: "Same."

Next defendant asked for his correspondent's number to which she responded that she did not have a cell phone. After some further discussion concerning a telephone, defendant: "You['re] open to a[]lot [of] stuff?" Officer: "I don't know." Defendant: "W[h]at is your limit?" Officer: "I don't know." Defendant: "Oh I thought you['re] very open that[']s all." Officer: "Tell me what [you] have in mind." Defendant: "Like having wild fun." Officer: "OK." Defendant: "[You] into it?" Officer: "Yes." Defendant: "[You] horny?" Officer: "Maybe, [are you]?" Defendant: "D[e]pends on [you]." Officer: "Yes." Defendant: "How big is your boob?" Officer: "Average. You saw my [picture]." Defendant: "You can tell me." Officer: "32B. Is that what [you] wanted to know?" Defendant: "Yea w[h]en you available?" Officer: "[W]ant, to get together?" Defendant: "Yea." Officer: "How [a]bout later tonight?"

Next defendant asked further questions about "the guy you met on[]line," inquiring as to the nature of their relationship. Then followed a discussion about how each of them was going to spend the evening, defendant stating he probably would read. Next there were further attempts by defendant to obtain a phone number where he could reach his correspondent. Defendant then asked questions about his correspondent's feet, suggesting he could lick them. After some interruptions, there followed a conversation about how far Anaheim was away and how long it would take to get there.

The officer then asked, "[Are you] going to bring condoms? I don't want to get pregnant." Defendant: "Put in and take it out." Officer: "No way." Defendant: "It is better feeling." Officer: "But I don't even know [you]. What if [you] have something." Defendant: "Nah." Officer: "[You] would have to use a condom." Defendant: "I would not feel anything. You like it more." Officer: "I don't know." Defendant: "Test it out." Officer: "I don't know." Defendant: "[You] love it." Officer: "[You] don[']t ever use a condom?" Defendant: "I do but don[']t have one now." Officer: "Well? No, go [buy] some." After defendant states he did not have the money and a brief conversation on this topic, defendant: "I guess we will not put it in." Officer: "But how do [you] know when to stop?" Defendant: "When you['re] about to go." And further, "You're that horny now?"

After some additional exchanges, including further discussions concerning the use of a condom, officer: "If [you] want to do it, I'll tell my mom I'm going to the library with a friend. If not, I won't bother. [You] tell me." Defendant: "Okay. I'm not familiar with Anaheim. Where in Anaheim are you?" There was more discussion about a location to meet, then officer: "If we [are] going to have sex without a condom, [you] have to promise me [you] won't get me pregnant. Can you promise that?" Defendant: "Yea." Then follows a discussion on where to meet and how to identify each other. They finally agree to meet at the Anaheim library.

Officer Fernandez, together with a team of investigators, went to the library where they saw defendant walk in, look around, and then leave the building. When defendant approached a car, the officers arrested him. Thereafter, the officer interviewed defendant who admitted that he had exchanged messages with "Kristi" who he thought was 12 or 13 years old. He claimed to have been joking when talking to her about having sex and only intended to read with her and warn her about having sex.

DISCUSSION

1. There was substantial evidence to support defendant's conviction.

Defendant's first argument is that there was insufficient evidence he believed the intended victim was only 13 years old. We need not spend much time on this issue. It is clear from the above recital of the computer conversation between defendant and the officer that he was told several times that his correspondent was 13. The fact that the chat room was only available to persons over age 18 was explained from the start. Defendant's statement "[w]hy do you want to do it when you[']re only 16?" was immediately followed by the response "I'm 13." And defendant admitted during his police interview following his arrest that he believed the girl to be 12 or 13.

Defendant also argues that "no substantial evidence shows [he] went beyond mere preparation in driving to the library to meet the decoy," in other words, that there was no substantial evidence he attempted to commit the crime of performing a lewd act on a child under age 14. A defendant can be convicted of an attempted lewd act with a child if he attempts, with sexual intent, to commit a lewd and lascivious act on a child under age 14 but fails to complete the crime or is prevented or intercepted before he can complete it. (Pen. Code, §§ 288, subd. (a), 664.) A conviction for an attempt to violate Penal Code section 288 can be upheld even if there was no actual child involved. (See *Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 185.)

In reviewing a claim of insufficient evidence, the court looks at the record in the light most favorable to the conviction and determines whether there is substantial evidence to support the conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1180.) Substantial evidence "is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) This court does not reweigh the evidence, but determines whether the evidence and inferences that could be drawn from it supported the fact finder's conclusions. (*People v. Ochoa*, *supra*, 6 Cal.4th at p. 1207.)

"'An attempt to commit a crime . . . requires . . . a specific intent to commit it and a direct but ineffectual act towards its commission . . . .'" (*People v. Imler* (1992) 9 Cal.App.4th 1178, 1181.) The act must go beyond preparation or planning and show that a defendant is making a direct movement towards committing the crime. (*People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, 8.) The act does not need to be "the last proximate act or an ultimate step towards commission of the crime," or even "satisfy an[] element of the crime. [Citation.]" (*Ibid.*) Whether an act is "merely preparatory or . . . sufficiently close to the consummation of the crime . . . depends on the facts and circumstances of a particular case. [Citations.]" (*Id.* at p. 14.) When a defendant's intent is clear, only slight acts towards commission of the crime are necessary to constitute an attempt. (*People v. Superior* Court (*Decker*), *supra*, 41 Cal.4th at p. 8.) With clear intent, an act that would be otherwise insufficient may be enough to constitute an attempt. (*People v. Staples* (1970) 6 Cal.App.3d 61, 68; *People v. Berger* (1955) 131 Cal.App.2d 127, 130.)

Defendant's intent was clear; he intended to meet a 13-year-old girl for the purpose of engaging in sexual relations with her. He went to the library and entered it, expecting to find his victim there. Under these circumstances, his act of entering the library was a sufficient act to move his conduct beyond mere preparation for the commission of the crime.

Both parties point us to *People v. Reed* (1996) 53 Cal.App.4th 389. There, the defendant arranged with a decoy to meet underage girls for the purpose of having sexual relations with them. A motel room was designated for the assignation. The court held that his entry into the motel room where he expected to find the girls constituted an act beyond mere preparation. (*Id*. at pp. 389-399.) Defendant places great emphasis on the fact that the defendant in *Reed* carried sexual items on his person; but nothing in the opinion suggests the case turned on this fact. The *Reed* court noted that its analysis would not be different had real children previously occupied the room but been removed before his arrival. (*Id*. at p. 399.) So here, defendant entering the agreed upon premises, whether a real 13-year-old girl was there awaiting him or not, would have been sufficient to constitute the attempt. Thus, we also disagree with defendant that, because he did not intend to have sex with his victim in the library, his conduct failed to rise to an "attempt."

2. The court did not abuse its discretion in denying probation.

Defendant notes "[t]he probation officer in this case, in a pre-plea report, recommended appellant be granted probation. The court, however, commenting that it found [defendant's] testimony to be incredible, denied probation. Defendant argues the denial of probation constituted an abuse of discretion." We disagree.

Defendant recognizes the "court has broad discretion to grant or deny probation . . . . (*People v. Marquez* (1983) 143 Cal.App.3d 797, 803.) Defendant's showing of remorse was, at best, limited. When he addressed the court he first apologized; then, when the court asked what he was apologizing for, he stated "I am apologizing that I went to the Internet, really sorry about that from the bottom of my heart and my soul." This was hardly an expression of regret for having attempted to have sex with a child.

The court carefully considered the issue. First it noted this was not an act upon an impulse but took several instances of communication, and required careful

preparation. It pointed out the crime involved a certain level of sophistication, "[n]ot the greatest sophistication, but it is not a naïve act either." The court also stated that defendant, who had testified he was engaged in some sort of a masquerade game when entering the library, "told one of the biggest boldfaced lies [it] ha[d] ever heard under oath in a court of law. Your whole story about the masquerade game that you were playing was just incredibly unbelievable." The record is clear that the court properly considered both the factors in aggravation and in mitigation of the sentencing guidelines (Cal. Rules of Court, rule 4.414). By no means can we conclude that the court abused its discretion in sentencing him to the middle term of three years' imprisonment.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.